No. 81946-7

SUPREME COURT
OF THE STATE OF WASHINGTON

JIM A. TOBIN,

Respondent,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner.

RESPONDENT TOBIN'S SUPPLEMENTAL BRIEF

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A. INTRODUCTION

In this case, the Court must determine if the lien afforded the Department of Labor & Industries ("Department") by RCW 51.24.060(2) against a recovery from a third-party tortfeasor for benefits paid to an injured worker under the Industrial Insurance Act, Title 51 RCW ("the Act") applies to the pain and suffering damages portion of the recovery. It is undisputed in this case that the Act itself does not compensate an injured worker for pain and suffering damages.

To adopt the Department's reading of the statute would require this Court to abandon its analysis of RCW 51.24.060 in *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 869 P.2d 14 (1994) and to interpret the statute in a fashion that overlooks the reimbursement purpose of the statute. Such an interpretation would be inconsistent with public policy in Washington for analogous recovery situations. Such an interpretation would not only be unfair, it would also be unconstitutional.

B. ISSUES PRESENTED FOR REVIEW

1. Was the Court of Appeals correct in determining that it was improper for the Department to apply its lien against Tobin's entire recovery from a third party tortfeasor, including the portion for pain and suffering, when the Department has not, and will not, pay Tobin for pain and suffering caused by his industrial injury?

2. If RCW 51.24.060 requires the application of the Department's lien to portions of Tobin's third-party settlement for which industrial insurance benefits are not provided, would the statute be unconstitutional as a taking or a violation of Tobin's substantive due process rights?

C. STATEMENT OF THE CASE

The facts and procedure in this case have been adequately set out in the Court of Appeals opinion and the parties' briefing below. The Court of Appeals affirmed the decision of the trial court,[1] the Honorable Stephanie A. Arend of the Pierce County Superior Court, reversing a prior decision by the Board of Industrial Insurance Appeals ("Board") that affirmed a September 29, 2005 Department order in which the Department had asserted a right to apply its lien to the entire amount of Jim Tobin's third party recovery, including the portion designated to compensation Tobin for pain and suffering. CP 40-46.

D. ARGUMENT[2]

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[1] *Tobin v. Dep't of Labor & Indus.*, 145 Wn. App. 607, 187 P.3d 780 (2008).

[2] As this case involves the interpretation of the Act, the Act is to "be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. To that end, "all doubts as to the meaning of the Act are to be resolved in favor of the injured worker." *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996); *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 745 P.2d 1295 (1987). This means that "where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the

(1) The Act Does Not Authorize the Department to Apply Its Lien to the Pain and Suffering Damages Portion of a Third Party Recovery

(a) RCW 51.24.060 Is a Reimbursement Statute

RCW 51.24.060 establishes a comprehensive system for the handling of industrial insurance claims where a worker's injury is caused by the fault of a third party tortfeasor and the injured worker chooses to seek recovery from that third party tortfeasor.[3] *See* Appendix.

If the injured worker pursues the third party tortfeasor and obtains a recovery by settlement or judgment, the attorney fees and costs associated with the recovery must be paid, and the worker receives 25% of the award. RCW 51.24.060(1)(a-b). The Department is entitled to receive the balance of the recovery to the extent it has paid out benefits to the injured worker. RCW 51.24.060(1)(c). The Department has a lien for its share. RCW 51.24.060(2). The Department must, however, share in the payment of attorney fees necessary to secure its recovery. RCW 51.24.060(1)(c)(i-iii). The Department, in its sole discretion, may compromise its lien. RCW 51.24.060(3).

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doubt belongs to the injured worker. . ." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001).

[3] RCW 51.24.050 actually requires the injured worker to make a decision about whether to pursue a claim against a third party tortfeasor. If the injured worker chooses not to proceed, his or her claim is assigned to the Department by operation of law, RCW 51.24.050(1), and the statute establishes how any recovery then generated must be distributed. RCW 51.24.050(4).

Once the injured worker receives the recovery, the Department or self-insurer makes no further payments under the Act until the amount of further compensation to which the worker is entitled equals the Department's or self-insurer's share. At that point, benefits resume. RCW 51.24.060(1)(c).

The crucial issue here is the public policy set forth in RCW 51.24.060(1)(c): "The department . . . shall be paid the balance of any recovery made, but only to the extent necessary to *reimburse* the department . . . for benefits paid." RCW 51.24.060(1)(c) is a *reimbursement* statute. The Department instead focuses on a definitional section, RCW 51.24.030(5), amended in 1995, without giving any serious attention to the actual language of .060(1)(c).

It is undisputed here that the Act does not pay pain and suffering damages in tort to an injured worker. For example, the Act pays medical expenses, RCW 51.36.010, which classically are *economic damages.* WPI 30.07.01; WPI 30.07.02; RCW 4.56.250(1)(a) (definition of economic damages). The Act also pays an injured worker temporary total disability benefits (time loss), RCW 51.32.090; loss of earning power, RCW 51.32.090(3); and permanent total disability benefits (pension), RCW 51.32.050, but these benefits are essentially wage replacement benefits. *Hubbard v. Dep't of Labor & Indus.,* 140 Wn.2d 35, 41, 992

P.2d 1002 (2000) (underlying purpose of Act is to ensure against loss of wage-earning capacity). As time loss is designed to compensate for lost earning power, and time loss and a pension do not differ in character, only in duration, *Hubbard,* 140 Wn.2d at 43, time loss and pensions under the Act only compensate for wage-related loss. Lost earning power (LEP) benefits clearly relate to wage loss. Again, all such time loss, LEP, or pension benefits are classically economic in nature. WPI 30.08.01; WPI 30.08.02; RCW 4.56.250(1)(a).

The Department cannot point to anything which suggests the Department paid Tobin one cent under the Act for the pain and suffering he experienced as a result of his industrial injury.

(b) *Flanigan* Confirmed the Statutory Policy of Reimbursement

In *Flanigan*, this Court analyzed RCW 51.24.060 at length in a case in which the Department asserted a right to apply its statutory right to reimbursement and its lien to loss the of consortium damages in an injured worker's recovery from a tortfeasor. This Court said in its opinion that to understand the meaning of the statute it was important to understand the historic compromises associated with the Act. Under those compromises, in exchange for certain payments without fault, injured workers do not

receive full compensation, and are not compensated for damages like pain and suffering or their spouse's loss of consortium. *Id.* at 423.

This Court stated that there are two general purposes for third-party actions permitted under RCW 51.24. First, they spread responsibility for compensating the injured worker to third parties who are at fault for the injury. Second, they permit the worker to increase his or her compensation beyond the Act's limited benefits. *Id.* at 424.

In allowing the Department to obtain *reimbursement* from the proceeds of any recovery from a third party, the Legislature achieved two results. First, such recoveries reduced the burden on the accident and medical funds for damages caused by a third party. Second, they prevented the worker from receiving a double recovery.[4] The Court noted the relationship between benefits paid and the portion of any third party recovery subject to Departmental reimbursement: "*[i]n other words the worker, under [the third party statute], cannot be paid compensation and benefits from the Department and yet retain the portion of damages which would include those same elements.*" (Italics in original). *Id.* at 425. This Court expressly noted that workers' compensation benefits do not

[4] The *Flanigan* court expressly *rejected* the very argument now advanced by the Department that excluding pain and suffering damages from the reimbursement policy of RCW 51.24.060 would somehow result in "double recovery" by injured workers. *Id.* at 425.

compensate injured workers for noneconomic damages so that such a recovery, therefore, would not constitute a double recovery. *Id.* at 425.

The *Flanigan* court expressly found the plain language of RCW 51.24.060(1)(c) was phrased in terms of "reimbursing" the Department. Citing dictionary definitions, the Court noted that "reimburse" means "to pay back (an equivalent for something taken, lost, or expended) to someone: REPAY," and stated that one cannot be "paid back" compensation one never received in the first place. *Id.* at 426. The Court concluded that allowing the Department to reach such recoveries would give an unjustified windfall to the Department at the expense of individual beneficiaries because the Department would receive a share of damages for which it has provided no compensation.

While the *Flanigan* court was dealing with loss of consortium damages rather than pain and suffering damages, the Court's analysis properly applies to pain and suffering damages, which are also not recoverable under the Act. The Court of Appeals decision below was consistent with the *Flanigan* court analysis.

(c) RCW 51.24.030(5) Does Not Change The *Flanigan* Interpretation of RCW 51.24.060(1)

The Department asserts that Tobin's argument and the reasoning of the *Flanigan* court are contrary to RCW 51.24.030(5), enacted in 1995 after the *Flanigan* decision. This argument is incorrect.

RCW 51.24.030(5) states: "For purposes of this chapter, 'recovery' includes all damages except loss of consortium." RCW 51.24.030(5) was part of SB 5399, a general industrial insurance bill enacted in 1995. But the Legislature did not amend RCW 51.24.060(1)(c), the key statutory basis for this Court's *Flanigan* decision, in 1995 or since that decision. In considering the language of RCW 51.24.030(5), this Court must read the language of .030(5) *in the context of RCW 51.24.060(1)(c)*,[5] as did the Court of Appeals here.[6] In enacting a technical correction bill, a bill that was ostensibly non-controversial in the Legislature, the legislative intent was merely to address *Flanigan's* holding. The Legislature excluded loss of consortium damages from the definition of recovery in RCW 51.24.060, as this Court commanded in *Flanigan*. The Legislature did not

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[5] "The primary goal of statutory construction is to carry out legislative intent." *Cockle*, 142 Wn.2d at 807. In Washington's traditional process of statutory interpretation, this analysis begins by looking at the words of the statute. "If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself." *Id.* The Court must look to what the Legislature said in the statute and related statutes to determine if the Legislature's intent is plain. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the language of the statute is plain, that ends the Court's role. *Cerrillo v. Esparza*, 158 Wn.2d 194, 205-06, 142 P.3d 155 (2006).

[6] As the Court of Appeals cogently observed, the Legislature did not alter the fundamental reimbursement policy of RCW 51.24.060(1)(c) interpreted in *Flanigan*; moreover, .030(5) and .060(1)(c) must be read together. *Tobin*, 145 Wn. App. at 615-16.

amend .060(1)(c) to alter the *reimbursement* policy of the statute, nor did it command specifically that the Department's reimbursement right and lien extend to pain and suffering damages. This Court need not resort to legislative history at all.[7]

If the Court does consider legislative history, that legislative history does not help the Department's contention that the Court of Appeals misinterpreted RCW 51.24.060. The final legislative report for SB 5399 explained that the bill was requested because "The Department believes that there are several technical changes to the worker's compensation statutes that would improve administration [including] . . . The term 'recovery' does not include damages for loss of consortium." CP 39. *See* Appendix. The bill report again merely confirms that SB 5399 amended RCW 51.24.030(5) to reflect this Court's *Flanigan*

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[7] This Court need only interpret RCW 51.24.030(5) and RCW 51.24.060(1)(c) if they are ambiguous. They are not. In construing the statutory language, the object of such construction is still to effectuate the Legislature's intent. *Dep't of Ecology,* 146 Wn.2d at 9-10, 11-12. A statute is ambiguous if it is subject to two or more reasonable interpretations. *State v. McGee,* 122 Wn.2d 783, 864 P.2d 912 (1993). In undertaking the construction of a statute, the Court must construe it in a manner that best fulfills the legislative intent. *State ex rel. Royal v. Board of Yakima County Comm'rs,* 123 Wn.2d 451, 459, 869 P.2d 56 (1994). But the Court should not read language into a statute even if it believes the Legislature *might* have intended it. *Kilian v. Atkinson,* 147 Wn.2d 16, 20, 50 P.3d 638 (2002). Statutes must be interpreted and construed so that all the language used is given effective, with no portion rendered meaningless or superfluous. *Stone v. Chelan County Sherriff's Dep't,* 110 Wn.2d 806, 810, 756 P.2d 736 (1988). The Court may resort to "principles of statutory construction, legislative history, and relevant case law" to assist it in discerning legislative intent only if the statute's language is ambiguous. *Cerrillo,* 158 Wn.2d at 202; *Cockle,* 142 Wn.2d at 809.

holding, a technical change in the law. The Legislature did not alter the reimbursement policy of .060(1)(c) identified by the *Flanigan* court.

As the Court of Appeals observed, the legislative history does not establish the intent for which the Department argues. *Tobin,* 145 Wn. App. at 618. The only mention of pain and suffering was in the testimony of certain non-legislator witnesses before the legislative committees. Most of the witnesses favorable to the Department's interpretation *were Department witnesses. Id.* The Department's reference to its own self-serving interpretation of the new legislation is hardly conclusive in the face of the statute's language and the failure to overrule *Flanigan's* confirmation of the reimbursement policy in RCW 51.24.060. Pain and suffering damages were not mentioned by the committees in their bill reports or analyses, nor was there any mention of pain and suffering in the discussions on the floor of the Senate. The discussion on the floor of the Senate, in fact, only noted that the bill would make it so that the Department would not be able to recoup the portion of a third party damages resulting from loss of consortium. There was no mention of any other benefits that the Department would be able or unable to recoup.

In any event, witness testimony before committees should be given little weight in statutory interpretation, as such testimony does not prove

what *the Legislature itself* intended in enacting a bill.[8] In *North Coast Air Servs. Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 326, 759 P.2d 405 (1988), this Court said witness testimony, including that of legislative staff counsel, was of little moment in discerning legislative intent:

> We necessarily give little weight to such source material. It is unwise to go behind the committee report and examine piecemeal quotations. What motivated the actual language of the statute is too speculative to be of assistance in interpreting the words enacted into law.

See Wilmot v. Kaiser, 118 Wn.2d 46, 61, 821 P.2d 18 (1991) (same). *See also, Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 611, 998 P.2d 884 (2000) (lobbyist declaration not evidence of legislative intent in enacting a bill).

In sum, this Court should apply the plain language of RCW 51.24.060(1)(c) *and* RCW 51.24.030(5) and uphold the Court of Appeals statutory analysis here.

(d) Tobin's Interpretation of RCW 51.24.060 Is More Consistent with Public Policy in Washington

In its petition for review, the Department asserted that it would somehow be unfair to exclude noneconomic damages from its lien. Underlying its assertion is the implication that it did something to obtain a

[8] Because the testimony of *former legislators* to establish legislative intent is generally inadmissible, *City of Yakima v. Internat'l Ass'n of Fire Fighters, AFL-CIO, Local 469*, 117 Wn.2d 655, 677, 818 P.2d 1076 (1991), the testimony of witnesses at legislative hearings is of even lesser importance.

recovery or to justify "reimbursement" from Tobin's pain and suffering award. A similar argument was advanced by the Washington Self-Insurers Association and the Association of Washington Business. The Department and the amici clearly forget that the laboring oar on any third-party recovery is borne *by the injured worker,* not them. They passively reap the benefit of the injured worker's time and expense in obtaining a recovery.[9]

They also gloss over the fact that Tobin experienced the actual pain and suffering, and the Act does not pay an injured worker like Tobin for that pain and suffering. They decline to discuss how the reimbursement policy of RCW 51.24.060(1)(c) is effectuated by the Department's asymmetrical claim to pain and suffering for which it paid no benefits to Tobin.

The Department's "parade of horribles" argument that it will lose significant resources if the Court of Appeals decision controls is simply wrong. Tobin's interpretation of RCW 51.24.060 would result in the Department actually being reimbursed for the medical benefits and wage

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[9] The Department's argument attempts to reverse the equity argument in an absurd way to try to distract from the harm being done to the worker by its interpretation of RCW 51.24.060(1). As the United States Supreme Court recently pointed out in citing *Flanigan,* "the department could not 'share in damages for which it has provided no compensation' because such a result would be 'absurd and fundamentally unjust.'" *Arkansas Dep't of Health & Human Servs. v. Ahlborn,* 164 L. Ed. 2d 459, 126 S. Ct. 1752 (2006).

loss benefits it paid Tobin. Actually, any unfairness in applying the Department's right to reimbursement to pain and suffering damages falls *on Tobin.*[10]

In this case, the Department was properly reimbursed for the medical and actual estimated wage loss it paid to Tobin from his settlement with a tortfeasor. The Department's estimate of its past and future costs is $643,233.40 ($80,501.40 past and $562,732.00 future). Meanwhile, Tobin recovered a total of $606,916.84 for medical and wage loss ($43,973.84 medical and $562,943.00 wage loss). The portion of the recovery dedicated to medical and wage loss would, therefore, cover nearly ninety-five (95) percent of the Department's costs if not for the statutory mandate that attorneys fees and costs be deducted as well as the requirement that the claimant receive twenty-five (25) percent of the remainder. The reasonableness of the apportionment here is not at issue; the Department approved Tobin's settlement.

The Department has also expressed an unsubstantiated fear that settling workers will "game" the system by allocating a greater portion of settlements to noneconomic, rather than economic, damages. That fear is, of course, misguided as to cases that are tried, as the trier of fact will set

[10] The *Flanigan* court properly found that the Department's interpretation of RCW 51.24.060 to allow it to apply its lien to pain and suffering damages constituted a

damages. *See* RCW 4.22.070(1). As for settlements, the Department retains considerable power to avert unfair settlements in its discretion on the compromise of its lien. RCW 51.24.060(3).

The Department's public policy arguments also fly in the face of this Court's policy on subrogation and the application of liens in other third party recovery settings. At its heart, Washington's worker compensation system is a form of insurance. Under Washington common law, a plaintiff must be made whole before an insurance company can claim a right to subrogation. While an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from a tortfeasor responsible for the plaintiff's injury, it can recover only the excess which the insured has received from the wrongdoer remaining *after the insured is fully compensated for his or her loss. Thiringer v. American Motors Ins. Co.,* 91 Wn.2d 215, 220, 588 P.2d 191 (1978). *Mahler v. Szucs,* 135 Wn.2d 398, 407, 957 P.2d 632 (1998); *Winters v. State Farm Mut. Auto. Ins. Co.,* 144 Wn.2d 869, 876, 31 P.3d 1164 (2001). Since Tobin has not, and will not, receive pain and suffering damages in his industrial insurance claim, he will not be made whole if the Department is allowed to take this part of his recovery.

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windfall to the Department and an absurd interpretation of the statute. 123 Wn.2d at 425-26.

Other statutory lien provisions are interpreted in accordance with Tobin's argument here. For example, the State has a lien against tort recoveries from third parties to reimburse it for Medicaid funds paid. RCW 43.20B.060. In *Ahlborn*, the United States Supreme Court held that a state may not apply its statutory lien for Medicaid benefits paid to recoveries from a third party tortfeasor beyond medical expenses. *See Paopao v. State,* 145 Wn. App. 40, 185 P.3d 640 (2008). Prior to *Ahlborn,* Washington interpreted the lien statute more broadly to apply to the entire tort recovery. *Wilson v. State,* 142 Wn.2d 40, 10 P.2d 1061 (2000). Four justices there noted:

> In the final analysis, the majority decision appears to be more influenced by its concern for replenishment of the State's medical fund, than by a concern for doing equity to Medicaid recipients. Majority at 1066, 1067. While its concerns about the solvency of the fund are certainly legitimate, the fund should be replenished only from amounts that a Medicaid recipient receives as reimbursement for elements of damages for which the State has assumed responsibility.

142 Wn.2d at 57. (Alexander, J, dissenting). *Wilson* was effectively overruled by *Ahlborn.* The *Wilson* dissenters correctly understood the policy issues at stake here and they were borne out by *Ahlborn.*

The Department's interpretation of RCW 51.24.060(1)(c) is inconsistent with that statute's reimbursement policy, and Washington

public policy generally. This Court should affirm the Court of Appeals interpretation of RCW 51.24.060(1)(c).

(2) The Department's Interpretation of RCW 51.24.060 Renders the Statute Unconstitutional

If the Court were to adopt the Department's analysis and apply the Department's lien to pain and suffering damages an injured worker recovers in a third-party action, RCW 51.24.060 would be unconstitutional as a taking,[11] or a violation of Tobin's right to due process of law.[12]

Negligence claims, whether unliquidated or reduced to judgment, constitute property. *Woody's Olympia Lumber, Inc. v. Roney,* 9 Wn. App. 626, 633-34, 513 P.2d 849 (1973). The government may no more seize an injured worker's pain and suffering damage recovery than it may seize a person's house or farm. In *Manufactured Housing,* this Court held that a right of first refusal constituted property and a statute that purported to give tenants such a property right in connection with the sale of a mobile home park was a taking and was invalid.

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[11] Washington's Constitution in article I, § 16 takes an expansive view of takings, even beyond the interpretation of takings in the Fifth Amendment to the United States Constitution which provides that "private property [shall not] be taken for public use, without just compensation." *See Manufactured Housing Communities of Washington v. State,* 142 Wn.2d 347, 13 P.3d 183 (2000).

[12] Art. I, § 3 of the Washington Constitution provides, [n]o person shall be deprived of life, liberty, or property without due process of law." Section I of the Fourteenth Amendment to the U.S. Constitution similarly states, "nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

The general purpose of RCW 51.24.060, permitting the Department to seek *reimbursement* for benefits actually paid, is only fulfilled if the third party recovery actually recovers damages analogous to those benefits. The Department has no right to an injured worker's property, pain and suffering damages, for which the Department paid the worker no benefits; it is not being reimbursed for such benefits. There is no quid pro quo between the injured worker and the State allowing application of the Department's reimbursement right to an injured worker's property interest in pain and suffering damages.

Similarly, the State's attempt to seize assets belonging to injured workers without a quid pro quo in benefits paid violates substantive due process principles.[13] Such principles place certain decisions beyond the authority of legislative bodies to address. In *Presbytery of Seattle v. King County,* 114 Wn.2d 320, 787 P.2d 907, *cert. denied,* 498 U.S. 911 (1990) this Court set out the criteria for establishing a substantive due process violation in the context of a land use regulation:

> To determine whether the regulation violates due process, the court should engage in a three-prong due process test and ask:

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[13] The Court of Appeals held that RCW 51.24.060 violated procedural due process principles in that the statute failed to give notice to injured workers that noneconomic damages could be attached to reimburse the Department's lien. *Tobin,* 145 Wn. App. at 619-20. That is an equally valid reason for not applying RCW 51.24.060 here.

(1) Whether the regulation is aimed at achieving a legitimate public purpose;
(2) Whether it uses means that are reasonably necessary to achieve that purpose; and
(3) Whether it is unduly oppressive on the landowner.

Id. at 330.

The *Presbytery* criteria apply with equal vigor to the facts here. The first element relating to a legitimate public purpose is satisfied. Reimbursement of the Department's expense for benefits actually paid to Tobin from a third party at fault for Tobin's injuries, thereby reducing the impact on the medical and accident funds, is an appropriate public goal. However, the second element that requires use of reasonably necessary means to achieve the public purpose, and the third element relating to undue oppression, render RCW 51.24.060(1)(c), as interpreted by the Department, unconstitutional.

The Act provides no compensation in any form for an injured worker's pain and suffering sustained in an industrial injury. The Department paid Tobin medical benefits. It also paid wage loss benefits (time loss and pension) and will continue to pay these benefits once the excess is exhausted. Tobin, however, will never be paid any benefit other than wage loss and medical expenses. The Department has not and will not pay benefits for pain and suffering.

To allow the Department to seize Tobin's pain and suffering damages when he has received no corresponding benefit under the grand compromise between workers and employers is unduly oppressive to Tobin's property rights. That is beyond the authority of the Legislature to allow.

The Department never paid, and never will pay, Tobin pain and suffering damages. As this Court pointed out in *Flanigan*, the Department cannot be "reimbursed" for damages that it never paid in the first place. Both of the purposes of RCW 51.24.060 articulated in *Flanigan* will be met by allowing the Department to be reimbursed from that portion of the third party recovery relating to medical expenses and wage loss. To the extent RCW 51.24.060 reaches the pain and suffering portion of Tobin's award, it violates his right to due process.

(3) Tobin Is Entitled to Attorney Fees at Trial and on Appeal

RCW 51.52.130 provides in industrial insurance cases that if a party other than the injured worker appeals a decision of the Board to superior or appellate court and the worker's right to relief is sustained, the worker is entitled to an award of attorney fees. This statute is liberally construed. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 670, 989 P.2d 1111 (1999).

RAP 18.1 provides that "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party must request the fees or expenses provided in this rule, unless a statute specifies that the request is to be directed to the trial court." Tobin requests an award of fees for the work of his counsel at trial and on appeal.

E. CONCLUSION

Because the Department does not pay pain and suffering damages under the Act, it cannot be "reimbursed" by taking an injured worker's pain and suffering recovery from a tortfeasor. The Department, therefore, does not have a right to include the pain and suffering portion of Tobin's award secured from a third party tortfeasor in its calculations under RCW 51.24.060. The Court of Appeals' decision was consistent with this Court's *Flanigan* decision, and general public policy principles in Washington. Were this Court to interpret RCW 51.24.060 to permit the Department to access Tobin's pain and suffering damages, it is an unconstitutional taking or a violation of substantive due process and is void.

This Court should affirm the Court of Appeals' decision, and costs on appeal, including reasonable attorney fees, should be awarded to Tobin.

DATED this 20th day of February, 2009.

Respectfully submitted,

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APPENDIX

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RCW 51.24.030

Action against third person — Election by injured person or beneficiary — Underinsured motorist insurance coverage.

(1) If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person.

(2) In every action brought under this section, the plaintiff shall give notice to the department or self-insurer when the action is filed. The department or self-insurer may file a notice of statutory interest in recovery. When such notice has been filed by the department or self-insurer, the parties shall thereafter serve copies of all notices, motions, pleadings, and other process on the department or self-insurer. The department or self-insurer may then intervene as a party in the action to protect its statutory interest in recovery.

(3) For the purposes of this chapter, "injury" shall include any physical or mental condition, disease, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.

(4) Damages recoverable by a worker or beneficiary pursuant to the underinsured motorist coverage of an insurance policy shall be subject to this chapter only if the owner of the policy is the employer of the injured worker.

(5) For the purposes of this chapter, "recovery" includes all damages except loss of consortium.

[1995 c 199 § 2; 1987 c 212 § 1701; 1986 c 58 § 1; 1984 c 218 § 3; 1977 ex.s. c 85 § 1.]

Notes:

Severability -- 1995 c 199: See note following RCW 51.12.120.

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RCW 51.24.060
Distribution of amount recovered — Lien.

(1) If the injured worker or beneficiary elects to seek damages from the third person, any recovery made shall be distributed as follows:

(a) The costs and reasonable attorneys' fees shall be paid proportionately by the injured worker or beneficiary and the department and/or self-insurer: PROVIDED, That the department and/or self-insurer may require court approval of costs and attorneys' fees or may petition a court for determination of the reasonableness of costs and attorneys' fees;

(b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the award: PROVIDED, That in the event of a compromise and settlement by the parties, the injured worker or beneficiary may agree to a sum less than twenty-five percent;

(c) The department and/or self-insurer shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the department and/or self-insurer for benefits paid;

(i) The department and/or self-insurer shall bear its proportionate share of the costs and reasonable attorneys' fees incurred by the worker or beneficiary to the extent of the benefits paid under this title: PROVIDED, That the department's and/or self-insurer's proportionate share shall not exceed one hundred percent of the costs and reasonable attorneys' fees;

(ii) The department's and/or self-insurer's proportionate share of the costs and reasonable attorneys' fees shall be determined by dividing the gross recovery amount into the benefits paid amount and multiplying this percentage times the costs and reasonable attorneys' fees incurred by the worker or beneficiary;

(iii) The department's and/or self-insurer's reimbursement share shall be determined by subtracting their proportionate share of the costs and reasonable attorneys' fees from the benefits paid amount;

(d) Any remaining balance shall be paid to the injured worker or beneficiary; and

(e) Thereafter no payment shall be made to or on behalf of a worker or beneficiary by the department and/or self-insurer for such injury until the amount of any further compensation and benefits shall equal any such remaining balance minus the department's and/or self-insurer's proportionate share of the costs and reasonable attorneys' fees in regards to the remaining balance. This proportionate share shall be determined by dividing the gross recovery amount into the remaining balance amount and multiplying this percentage times the costs and reasonable attorneys' fees incurred by the worker or beneficiary. Thereafter, such benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third person.

(2) The recovery made shall be subject to a lien by the department and/or self-insurer for its share under this section.

(3) The department or self-insurer has sole discretion to compromise the amount of its lien. In deciding whether or to what extent to compromise its lien, the department or self-insurer shall consider at least the following:

(a) The likelihood of collection of the award or settlement as may be affected by insurance coverage, solvency, or other factors relating to the third person;

(b) Factual and legal issues of liability as between the injured worker or beneficiary and the third person. Such issues include but are not limited to possible contributory negligence and novel theories of liability; and

(c) Problems of proof faced in obtaining the award or settlement.

(4) In an action under this section, the self-insurer may act on behalf and for the benefit of the department to the extent of any compensation and benefits paid or payable from state funds.

(5) It shall be the duty of the person to whom any recovery is paid before distribution under this section to advise the department or self-insurer of the fact and amount of such recovery, the costs and reasonable

attorneys' fees associated with the recovery, and to distribute the recovery in compliance with this section.

(6) The distribution of any recovery made by award or settlement of the third party action shall be confirmed by department order, served by registered or certified mail, and shall be subject to chapter 51.52 RCW. In the event the order of distribution becomes final under chapter 51.52 RCW, the director or the director's designee may file with the clerk of any county within the state a warrant in the amount of the sum representing the unpaid lien plus interest accruing from the date the order became final. The clerk of the county in which the warrant is filed shall immediately designate a superior court cause number for such warrant and the clerk shall cause to be entered in the judgment docket under the superior court cause number assigned to the warrant, the name of such worker or beneficiary mentioned in the warrant, the amount of the unpaid lien plus interest accrued and the date when the warrant was filed. The amount of such warrant as docketed shall become a lien upon the title to and interest in all real and personal property of the injured worker or beneficiary against whom the warrant is issued, the same as a judgment in a civil case docketed in the office of such clerk. The sheriff shall then proceed in the same manner and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgment in the superior court. Such warrant so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the department in the manner provided by law in the case of judgment, wholly or partially unsatisfied. The clerk of the court shall be entitled to a filing fee under RCW 36.18.012(10), which shall be added to the amount of the warrant. A copy of such warrant shall be mailed to the injured worker or beneficiary within three days of filing with the clerk.

(7) The director, or the director's designee, may issue to any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, a notice and order to withhold and deliver property of any kind if he or she has reason to believe that there is in the possession of such person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, property which is due, owing, or belonging to any worker or beneficiary upon whom a warrant has been served by the department for payments due to the state fund. The notice and order to withhold and deliver shall be served by the sheriff of the county or by the sheriff's deputy; by certified mail, return receipt requested; or by any authorized representatives of the director. Any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state upon whom service has been made shall answer the notice within twenty days exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired of in the notice and order to withhold and deliver. In the event there is in the possession of the party named and served with such notice and order, any property which may be subject to the claim of the department, such property shall be delivered forthwith to the director or the director's authorized representative upon demand. If the party served and named in the notice and order fails to answer the notice and order within the time prescribed in this section, the court may, after the time to answer such order has expired, render judgment by default against the party named in the notice for the full amount claimed by the director in the notice together with costs. In the event that a notice to withhold and deliver is served upon an employer and the property found to be subject thereto is wages, the employer may assert in the answer to all exemptions provided for by chapter 6.27 RCW to which the wage earner may be entitled.

[2001 c 146 § 9; 1995 c 199 § 4; 1993 c 496 § 2; 1987 c 442 § 1118; 1986 c 305 § 403; 1984 c 218 § 5; 1983 c 211 § 2; 1977 ex.s. c 85 § 4.]

Notes:

Severability -- 1995 c 199: See note following RCW 51.12.120.

Effective date -- Application--1993 c 496: See notes following RCW 4.22.070.

Preamble -- Report to legislature -- Applicability -- Severability -- 1986 c 305: See notes following RCW 4.16.160.

Applicability -- Severability -- 1983 c 211: See notes following RCW 51.24.050.

DECLARATION OF SERVICE

On this day said forth below, I deposited with the U.S. Postal Service a true and accurate copy of the Respondent Tobin's Supplemental Brief in Supreme Court Appeals Cause No. 81946-7 to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 20, 2009, at Tukwila, Washington.

Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

ORIGINAL – FILED BY E-MAIL ATTACHMENT